



# THE SHORT BREAKS PARTNERSHIP

## Short Break for Children with Complex Needs

By Steve Broach, Barrister at Monkton Chambers

*The final article in this series on key legal issues in the provision of short breaks concerns short breaks for children with complex needs. In particular the focus is on the duties owed by the NHS to facilitate short breaks for this group of children.*

The overriding obligation on local authorities and NHS bodies<sup>1</sup>, particularly Clinical Commissioning Groups (CCGs), is to work together to ensure children's needs are considered and addressed. This duty is expressed in a number of places throughout the statutory scheme – for example:

- Children Act 2004 section 10, which requires local authorities and health bodies to co-operate to safeguard and promote the welfare of children in their area
- NHS Act 2006 section 82, which requires NHS bodies and local authorities to co-operate to advance the health and welfare of their populations
- Children and Families Act 2014, which imposes a range of duties in relation to co-operation including a requirement for joint commissioning arrangements to be in place in every area (section 26).

It is particularly important that CCGs play a full part in the commissioning and development of short break services in their area, as there will be some children with needs of such complexity that they fall outside the scope of the duties owed by local authorities. This is shown by the important case of *R (T, D and B) v Haringey LBC* [2005] EWHC 2235 (Admin), concerning a three year old child with a tracheostomy. The issue was whether either the local authority or the NHS body had a duty to provide child D with additional short break care. The Judge held that on the facts of that case the care required fell outside of the scope of the duties in the Children Act 1989 (para 68). A local authority cannot act as 'substitute or additional NHS for children' (also para 68). Therefore high levels of medical care (including nursing care) for children will be the responsibility of CCGs, not local authorities.

The key duty on CCGs is found in section 3 of the NHS Act 2006, as amended by the Health and Social Care Act 2012. This requires each CCG to arrange for the provision of a wide range of services 'to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility'.

This duty is drafted in very broad terms and does not create any specific right to health services for a particular person. This is one of the reasons why the imposition of duties on NHS bodies under the Children and Families Act 2014 is so important. New advice for CCGs, health professionals and local authorities was published by

---

<sup>1</sup> NHS England has commissioning responsibility for some very specialist health services which disabled children may need, for example 'tier 4' CAMHS (Child and Adolescent Mental Health Services).

central government in February 2016.<sup>2</sup> In particular, under the Children and Families Act where a disabled child with complex needs has an Education, Health and Care Plan, the CCG must 'arrange the specified health care provision for the child or young person', see section 42(3). Education, Health and Care Plans are however reserved for children with significant special educational needs.

CCGs must also work with local authorities to contribute to the 'Local Offer' of services available, but there is no right to any particular level or type of services under the Local Offer. Paragraph 12 schedule 2 to the SEN and Disability Regulations 2014 mandates that every Local Offer must include 'Health care provision for children and young people with special educational needs or a disability that is additional to or different from that which is available to all children and young people in the area...'. It is important to note that paragraph 12 specifically requires the Local Offer to include arrangements for making universal services accessible to children and young people with special educational needs and disabled children and young people, which may reduce the need for specialist short breaks.

### **Key guidance: The National Framework**

The guidance which applies to all children with complex needs is the National Framework for Children and Young People's Continuing Care, which has recently been reissued (February 2016). The National Framework is for children whose needs are 'so complex, that they cannot be met by the services which are routinely available from GP practices, hospitals or in the community' (para 2). Although the National Framework is said merely to provide 'advice' to CCGs, it sets out a detailed process by which eligibility for 'continuing care' should be determined. Any CCG which departs significantly from the National Framework may therefore have to justify this if challenged in court.

The National Framework sets out a three stage process:

- Assessment, led by a nominated children and young people's health assessor and leading to a recommendation as to whether the child has continuing care needs
- Decision making, by a multi-agency forum or panel considering the recommendation and deciding whether or not the child has continuing care needs. The aim should be for a decision to be given to the child or young person and their family within 6 weeks (para 50).
- Development of a package of care. The National Framework states that 'Commissioners will decide how the continuing care will be provided, what proportion and level of resource is required to deliver it and how much needs to be specially commissioned'.

Importantly, the National Framework states that 'Unless there is a good reason for this not to happen, continuing care should be part of a wider package of care, agreed and delivered by collaboration between health, education and social care'. This is plainly correct, albeit that the social care input must not require the local authority to

---

<sup>2</sup> Department for Education / Department of Health, *0 to 25 SEND code of practice: a guide for health professionals, Advice for clinical commissioning groups, health professionals and local authorities*, February 2016.

act as a 'substitute NHS'. The National Framework recognises this by reference to the Haringey judgment, see para 26 and Annex C.

Guidance as to which children may have continuing care needs is provided in a 'decision support tool'. The National Framework states (para 148) that 'A child is likely to have continuing care needs if assessed as having a severe or priority level of need in at least one domain of care, or a high level of need in three domains of care'. Importantly one of the domains is 'behaviour'. As a consequence the National Framework states (para 28) that 'Assessment of a child's needs should consider the extent to which a child with a learning disability, or autism may have a continuing care need due to challenging behaviour'.

There is undoubtedly an expectation under the National Framework that children assessed as eligible for continuing care will receive a bespoke package of support, which may include short breaks. The National Framework states (para 95) that 'The package of care must be shaped by the child or young person's support needs, rather than by what is offered by providers'.

In deciding what level of services, including short breaks, are required by a child with complex needs, the CCG must take into account:

- The NHS Mandate for 2016-17, which states that vulnerable children 'should receive high quality, integrated services that meet their health needs'. The current NHS Mandate (2015-16) states that 'One area where there is a particular need for improvement, working in partnership across different services, is in supporting children and young people with special educational needs or disabilities'.
- The NHS Constitution, which contains a number of statements of 'rights', including that 'You have the right to receive care and treatment that is appropriate to you, meets your needs and reflects your preferences' and 'You have the right to expect your NHS to assess the health requirements of your community and to commission and put in place the services to meet those needs as considered necessary'.

CCGs will also need to consider disabled children's rights to health, including those in article 25 of the UN Convention on the Rights of Persons with Disabilities and article 24 of the UN Convention on the Rights of the Child, which will be relevant when decisions are made which engage the rights protected under the Human Rights Act 1998. Both the UN Conventions describe disabled children's rights to the 'highest attainable standard of health'.

At para 101, the National Framework states 'Decisions about residential care and other social care support must of course be made by the local authority, as lead commissioner for social care, with health working alongside to identify how the child/young person's health needs can be met'. That may well be true generally, but following the Haringey judgment the CCG will need to take the lead or act as the sole commissioner where the child's health needs are such that they fall outside the scope of the local authority's duties. These issues need to be addressed and resolved by local authorities and CCGs as soon as they arise in the light of the co-operation duties summarised above to avoid any detriment to the child.

Furthermore the National Framework states (para 54) that 'Children and young people who require fast-track assessment because of the nature of their needs (such as a palliative care need) should be identified early and the child or young person's needs met as quickly as possible. The continuing care process should not restrict access to end-of-life care for children and young people who require immediate support over a shorter period, and should not result in any delay to appropriate treatment or care being put in place.'

In all decisions made in relation to children's health needs time will be of the essence. As the Working Together to Safeguard Children guidance says in relation to children's social care needs, 'For children who need additional help, every day matters' (para 10, p7). The response to children's assessed health needs must therefore always be made in a reasonable time. Where children are eligible for continuing care, the National Framework states that arrangements to deliver the package of care should be in place 'as soon as possible'.

As set out in the previous bulletin, children with complex health needs will generally be entitled to a personal budget, and can receive a direct payment. There is however no right to direct payments in health – it will be up to the CCG in each case to decide whether the child's needs should be met that way if it is what the family want, subject to the usual public law requirements of fair, rational and reasonable decision making.